



POLICE DEPARTMENT

January 21, 2015

MEMORANDUM FOR: Police Commissioner

Re: Detective James Walsh
Tax Registry No. 935947
Narcotics Borough Brooklyn North
Disciplinary Case Nos. 2013-10590

Detective Brian Martin
Tax Registry No. 930653
Narcotics Borough Brooklyn North
Disciplinary Case No. 2013-10591

The above-named members of the Department appeared before me on July 18, 2014, charged with the following:

Disciplinary Case No. 2013-10590

1. Said Detective James Walsh, on or about May 30, 2012 at approximately 1730 hours, while assigned to the Brooklyn Borough North Narcotics Command and on duty, in the vicinity of the Broadway and Marion Street intersection, Kings County, abused his authority as a member of the New York City Police Department, in that he searched Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 - STOP AND FRISK

Disciplinary Case No. 2013-10591

1. Said Detective Brian Martin, on or about May 30, 2012 at approximately 1730 hours, while assigned to the Brooklyn Borough North Narcotics Command and on duty, in the vicinity of the Broadway and Marion Street intersection, Kings County, abused his authority as a member of the New York City Police Department, in that he searched Person B without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 - STOP AND FRISK

The Civilian Complaint Review Board (CCRB) was represented by Nicole Junior, Esq., Respondents Walsh and Martin were represented by Michael Lacondi, Esq.

Respondents through their counsel entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2013-10590

Respondent Walsh is found Not Guilty.

Disciplinary Case No. 2013-10591

Respondent Martin is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is undisputed that on May 30, 2012 Respondents Walsh and Martin, while assigned to the tactical response unit stopped Person A and Person B. A in the vicinity of Broadway and Stone avenues in Brooklyn. Neither Person A nor Person B responded to subpoenas or letters requesting their presence at this proceeding. Person B was interviewed by the CCRB, but Person A was never formally interviewed and in this proceeding only the out-of court statement of was offered into evidence.

Respondents Walsh and Martin were in plainclothes in an unmarked vehicle, a grey

Mitsubishi when they observed Person B and Person A. Person B displayed an oxycodone pill to Person A while Person A held a marijuana cigarette. Both Respondents made a decision to stop Person B and Person A based on their observations.

What is in dispute is whether Respondent Walsh searched Person A without sufficient legal authority and whether Respondent Martin searched Person B without sufficient legal authority.

The CCRB's Case

CCRB offered the out-of-court statement of Person B

Out-of Court Statement of Person B

Person B was interviewed by the CCRB on July 09, 2012. He stated that he resides on [REDACTED]. On May 28, 2012, at approximately 5:30 p.m. in the vicinity of Broadway and Marion Street in Brooklyn, Person B said he was walking to the middle of the block when he saw a friend. The friend told him to stop at the corner and get two loose cigarettes. He did not go into the store to get the two loose cigarettes, but he received them from a guy selling them in the middle of the block. Once he walked back toward the corner, he saw two officers in an unmarked car. They jumped out and asked him what he had. Person B said he told them he received the "two looseys [cigarettes] in my hand." The other officer then asked Person B if he could look in his pocket.

Person B said the officer told him that they were conducting an investigation.

Person B told the officer that if he was investigating, he would know that he [Person B]

did not go into the store, but he received the two loose cigarettes and there was no reason for them to want to search his pockets. Person B said he was still with his friend (later identified as Person A). The officers asked Person A to empty his pockets and Person A had a "joint" (marijuana cigarette) in his pocket. His friend was subsequently handcuffed and arrested. When they asked Person B to empty his pockets, he refused. One of the officers went into his pocket anyway and in the "top pocket" Person B said he had his medicine, oxycodone which he takes for his herniated disc in his back. One of the officers advised him that the drug was a controlled substance and that they are having problems with the drug on the streets. Person B tried to explain that it was his medicine. He was told to turn around, and he was subsequently arrested.

Person B said he saw a friend and told him to tell his wife to bring his medicine bottle to the precinct. Person B said his wife brought the bottle to the precinct, but officers told her the medicine was not updated. She advised them that her husband has an updated one, but she could not find it, so she brought that one to the station house. (Person B presented a sticker from the pill bottle at the interview). He explained that sometimes the pill is so strong that it makes him drowsy, so he would take half of the pill. His wife advised him to carry the medicine sticker with him in case he was ever stopped.

At the precinct, Person B said he showed the officer the sticker that came off of his pill medication bottle. The officer told him that he was not locked up for the pill, but that he had a "roach" (partially smoked marijuana cigarette) on him which Person B denied. Person B explained that he went through central booking and his lawyer explained to him that he was locked up for a controlled substance. He said the officers lied to him prior to him going to Central Booking.

Person B was questioned by CCRB as to who he was with at the beginning of the incident. He said he was with Person A, who lives across the street from his residence. He described the officers as two white males, one with blonde hair and the other with dark hair. He said they were both dressed in T-shirts and jeans. He explained that the blonde-haired officer (later identified as Respondent Walsh) frisked Person A and the other officer (later identified as Respondent Martin) frisked him. He further explained that after Respondent Martin frisked him, he unbuttoned his jeans, loosened the belt, and checked his underwear to insure that he was not hiding drugs in his anal area. He also stated that all of his pockets were searched. His friend Person A was searched the same way. Respondent Martin also pulled his wallet out from one of his back pockets. He recovered the oxycodone pill from his front pocket. Person B said Respondent Martin questioned him about the pool room where people get arrested all of the time. Person B said he purchased cigarettes from a guy standing outside of the pool room and he never went into the pool room. He told Respondent Martin that Respondent Martin did not observe a hand to hand drug transaction between him and Person A because he [Person B] only had cigarettes in his possession.

During continued questioning, Person B said he does not smoke and he was getting the cigarettes for his girlfriend.

The Respondents' Case

Respondents testified in their own behalf.

Respondent Martin

Respondent Martin is a 12-year member of the Department currently assigned to Brooklyn North Narcotics. He was promoted to the rank of detective in July 1998 when he was first assigned to Brooklyn North Narcotics. He has participated in "buy and bust" operations with undercovers, street observations, and search warrants. He testified that he has made over 600 arrests in his career and has never been the subject of a CCRB (other than this one), and never received Charges and Specifications (other than this case).

On May 30, 2012, Respondent Martin was working around 5:30 p.m. in the vicinity of Broadway and Stone Avenue. He described Broadway as a commercial two-way street with public housing on the corner. He said that his unit in narcotics usually addresses complaints from community leaders and his supervisors at the command. He was working with Respondent Walsh and they were in an unmarked vehicle when they observed two males walking west on Broadway from Stone Avenue. He observed the male black (identified as Person B) display a pill to the male Hispanic (identified as Person A) who was holding a marijuana cigarette. He surmised that Person B was going to sell the pill. Once Respondent Martin spotted Person B and [REDACTED] he believed the males spotted him because the males each put the narcotics in their hands in their pockets. Respondent Martin said he stepped out of his vehicle and he and his partner stopped them by uttering the words, "Police. Hold on for a second." Respondent Martin said he dealt

with Person B, and he recovered the pill by reaching in the pocket he saw him place it in. He then placed Person B under arrest and secured the pill until he gave the pill to the arresting officer to be vouchered. Once he arrested Person B, he called for a prisoner van to pick him up. When asked how he knew the pill was a controlled substance, Respondent Martin said the way that Person B held the pill as he showed it to Person A made him believe Person B was trying to sell pills to Person A.

During cross-examination, Respondent Martin acknowledged that Stone Street is also known as Mother Gaston Boulevard and it is another busy, two way street that is well traveled by pedestrian and vehicular traffic. He admitted that he was able to see the pill in Person B's hand from a distance. He also admitted that he recovered the pill from Person B's pocket before placing him under arrest. Initially, Respondent Martin said that Person B did not tell him that he had a prescription for the pill. When confronted with the transcript of his CCRB interview held on March 22, 2013, Respondent Martin acknowledged that Person B said he had a prescription, just not on him that day (tr. p. 11, lines 19-25). Respondent Martin was questioned as to whether he recovered any other pills and he denied that. He was asked whether he recovered any other illicit drugs and he stated that he recovered a marijuana cigar from Person B. When given his entire CCRB transcript of his interview to review, Respondent Martin acknowledged that he did not state during the interview that he recovered a marijuana cigar from Person B.

During redirect examination, Respondent Martin testified that Person B was under arrest as soon as he recovered the pill. He stated that the CCRB interview occurred several months after the incident, March of the following year, and that he had made approximately one hundred arrests between the date of the incident and the time of his

interview. He noted that Person A was with Person B at the time of the arrest and Person A was holding a marijuana cigarette.

During further cross-examination, Respondent Martin testified that he was never questioned about the marijuana cigar at his CCRB interview and he did not bring it up. Upon questioning by the Court, Respondent Martin said he was asked if he recovered contraband during the frisk. Respondent Martin said he answered no because he recovered the marijuana cigar incident to the arrest for the pill.

Respondent Walsh

Respondent Walsh is a ten-year member of the Department currently assigned to Brooklyn North Narcotics. He testified that he became a detective in the command in May 2010. He explained that on the incident date, May 30, 2012 he was on the tactical response unit which covers violence and drug activity in violent areas which span all of Brooklyn North. Prior to that, he was assigned to the 73 Precinct module where he did buy and bust enforcement, search warrants, confidential informant buys and case work. He estimated that he had made 500 arrests in his career.

Respondent Walsh corroborated Respondent Martin's testimony with respect to their assignment on the incident date and their observations of both Person A and Person B. He stated that they were in plainclothes in a gray Mitsubishi when they made the observations and that it was a mutual decision to stop the two men. He further explained that when he exited the vehicle, he approached Person A and recovered the marijuana cigarette from the pocket he placed it in. He could not recall if he put the handcuffs on

Person A first or recovered the cigarette first, but he stated that in either case, Person A was not free to leave given his observation of Person A with the marijuana cigarette in his hand. Respondent Walsh explained that once the marijuana cigarette was recovered, he conducted a subsequent search for contraband and any personal items and placed them in a manila envelope. He obtained pedigree information from Person A and then a call was made for the prisoner van to pick Person A up. Respondent Walsh could not recall if he transported Person A to the precinct cell area. He had no recollection of any interaction with Pers. A following the prisoner van. When questioned as to how he knew A had a marijuana cigarette, he stated that he has a lot of training and experience and knows how marijuana is rolled, how it is held and what it looks like. Respondent Walsh estimated that he was about a car width away when he made his observations of Person A.

During cross-examination, Respondent Walsh said he suspected the cigarette was marijuana because it had white wrap paper with something in it and it did not have a filter. He could not recall smelling the marijuana. He acknowledged that Person A and Person B were cooperative.

During redirect examination, Respondent Walsh said he believed he had some conversation with Person A and did not simply step out of the car, say, "Police," and go "right into his pocket."

During further cross-examination, Respondent Walsh acknowledged that he went right into Person A's pocket. He explained that what he meant by the statement was that he did not search all of his pockets, but limited himself to the pocket where he observed him place the marijuana cigarette. Respondent Walsh said that Person A was under arrest and not free to leave before he recovered the marijuana. Upon review of his CCRB

interview, however, Respondent Walsh acknowledged that he told CCRB Person A he was not under arrest until he recovered the marijuana cigarette.

During questioning by the Court, Respondent Walsh acknowledged that when he testified to seeing Person A in the neighborhood, he could just be familiar with him because he lives in the area. He admitted that his familiarity with Person A was not proof of criminality. When asked to explain the totality of the circumstances that resulted in the stop, he stated that the way Person A was holding the cigarette led him to believe he had a marijuana cigarette. He also said the way Person B was holding the pill and showing it to Person A was the way one would show a controlled substance being sold. He testified that he never observed a sale or exchange of money and never stated that such a transaction was taking place that day.

FINDINGS AND ANALYSIS

Respondents Walsh and Martin each stand charged with the sole specification of searching Person A and Person B, respectively, without sufficient legal authority. Both testified credibly before this Court that they were in an unmarked, grey Mitsubishi in plainclothes when they made observations of Person A and Person B. Respondent Walsh testified that they were approximately a car width away when they made the observations. They observed Person B show Person A a pill while Person A was holding a marijuana cigarette. They believed both men observed them, because they (Person A and Person B) both placed the narcotics in their possession in their pocket. While both Respondents appeared before this tribunal and testified, neither Person A nor Person B appeared. Person A never appeared before the CCRB for an official interview.

Both Person A and Person B were sent letters and subpoenas to their last known address and were requested to appear, yet neither appeared for trial. There was no evidence offered on behalf of Person A and the CCRB prosecutor relied solely on her cross-examination of Respondent Walsh to prove her case with respect to Person A. With respect to Person B, the CCRB prosecutor offered his out-of-court statement (CCRB X 1) to prove its case, but the statement was not very reliable.

Person B stated that he does not smoke, but he met Person A who asked him to get two loose cigarettes. If he was referring to some other friend who asked him to get the cigarettes, he was unclear in his statement. He was specifically asked who he was with and he only mentioned Person A. The Court does not understand the relevance of him buying loose cigarettes from someone else if he does not smoke. In addition, if Person A was with him, why did not Person A buy the cigarettes for himself? If Person B purchased the cigarettes for a "girlfriend," as he later stated toward the end of his interview, why was that person not someone he mentioned in his interview? Or someone he told the police about when he was stopped on the street? Was it because he had a wife? There are many unanswered questions when evidence is presented in this hearsay fashion.

Person B's demeanor during his interview could not be determined. His absence made it impossible to fully assess his credibility because his version of events was not tested by cross-examination. For example, there was no explanation as to why if Person B had the sticker from his pill bottle on him (assuming he peeled it off the pill bottle) when he was stopped by Respondent Martin, why he did not present it in his own defense as proof that he had a prescription for his pill to avoid arrest. It is conceivable that he did have a marijuana cigar on him and that is why he gave the statement about

having loose cigarettes on him that he bought on the street from an unidentified man that he also did not attempt to call over in his defense while being stopped on the street. It must be noted that the purchase of loose cigarettes on the street is not a legal activity either.

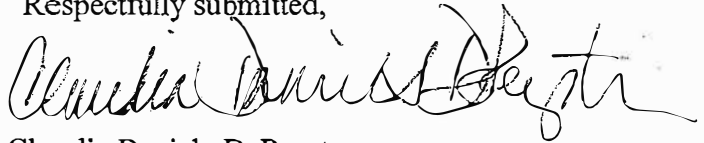
A portion of Person B's statement, however, did support Respondent Martin's account that he did not simply walk over to Person B and immediately go in his pocket. Person B said he was asked to empty his pocket and when he refused, Respondent Martin went in his front pocket and recovered the oxycodone pill. The same occurred with Person A, except that when Respondent Walsh asked Person A to empty his pocket, he did and a marijuana cigarette was recovered and Person A was arrested according to Person B's statement.

Based on the testimony of both Respondents, they made observations, they both confronted Person A and Person B, and they recovered the illegal drugs from where they saw them placed. Absent a prescription, as Person B stated he failed to carry one, the oxycodone pill was illegal. Both Respondents testified that once Person A and Person B were under arrest, a search of their persons were conducted incident to the arrests. Handcuffs did not have to be immediately placed on either man for them to be under arrest and not free to leave; particularly since Respondents testified that both Person A and Person B were cooperating and not resisting.

Both Respondents established the legal authority to search Person A and Person B and the CCRB prosecutor failed to establish by a preponderance of the credible evidence otherwise.

Accordingly, Respondent Walsh in Disciplinary Case No. 2013-10590 is found Not Guilty and Respondent Martin in Disciplinary Case No. 2013-10591 is found Not Guilty.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials

APPROVED

FEB 26 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER